A **ADISWARAN THARUMAPUTRINTAR**

v.

PP & OTHER APPEALS

B FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ABDULL HAMID EMBONG FCJ
AHMAD MAAROP FCJ
HASAN LAH FCJ
C ZALEHA ZAHARI FCJ
[CRIMINAL APPEALS NO: 05-314-11-2011(B),
05-315-11-2011(B), 05-316-11-2011(B)
& 05-317-11-2011(B)]
5 FEBRUARY 2014

D ***CRIMINAL LAW:*** *Penal Code - Sections 34, 302 - Murder - Common intention to commit murder - Proof - Whether ingredients of murder proved against accused persons - Whether evidence only pointed to guilt of first accused - Whether no evidence that other accused present* E *at scene as confederates of first accused*

CRIMINAL LAW: *Penal Code - Sections 34, 302 - Murder - Circumstantial evidence - Whether conclusively pointing towards guilt of accused persons - Common intention - Whether sufficiently proved by* F *prosecution - Whether conclusively showed that death was caused only by first accused - Whether prima facie case proved against other accused persons*

EVIDENCE: *Adverse inference - Murder - Failure to call important witness - Whether fatal to prosecution's case - Whether sufficient effort* G *made to trace witness - Whether adverse inference ought to be invoked - Penal Code s. 34, 302 - Evidence Act 1950, s. 114(g)*

The four accused persons in these four appeals were convicted of murder under s. 302 read with s. 34 of the Penal Code and were H sentenced to death by the High Court. They were alleged to have committed the offence on the deceased, an Indian national by the name of Manivanan s/o Vellaysamy ('Manivanan'), presumably because Manivanan had eloped with the first accused's sister ('Jayanthi'). The circumstantial evidence as adduced by the I prosecution showed that the first accused ('Mainthan') and PW9

had subsequently caught up with Manivanan, whereupon they took him to the first accused's house; that PW9 later went to the first accused's house and there he saw: (a) the four accused together with some others drinking liquor in the store at the back of the house; (b) the first accused was then holding a knife while the third accused a parang; and (c) one Kalidash was lying on the floor with his head bleeding; that PW19, who later passed by the same store, saw a naked body on the floor of the store whose head was smashed and covered with blood, and arising thereof, was threatened by the first accused not to inform the police; that a day after these incidents, Manivanan's body parts were found at Jalan Mengkudu off Jalan Ampang; that upon information provided by the first accused, the police recovered a parang and a knife from a drain in Pandan Indah, as well as Manivanan's other body parts from a sewerage tank in Pandan Jaya; and that, Manivanan's fingerprint was found to have matched that of an Indian national by the name of Kalidash s/o Arumugam ('Kalidash') who had a criminal record number 1567696. The evidence aside, it was not disputed that PW10 and PW19 had given their respective statements to the police incriminating the four accused persons.

All the four accused persons denied any involvement in the murder. In essence, their story was that it was one Devadas that was beaten by the first and third accused, but that Devadas was later taken to the hospital by the third accused's sister and brother in law and was discharged after receiving treatment thereat. The learned trial judge found the defence of the four accused as an afterthought, and a concoction, and further that Manivanan or Kalidash was one and the same person, and in the circumstances, found all the accused persons guilty as charged. The accused persons appealed to the Court of Appeal and upon the same being dismissed, appealed further. Before the Federal Court, the accused, *inter alia,* raised the arguments that the decisions of the High Court and the Court of Appeal were unsustainable as: (i) the ingredients of murder had not been proved by the prosecution; (ii) there was uncertainty as to the identity of the deceased; (iii) the prosecution's key witnesses, PW10 and PW19, were unreliable and that their evidence ought to be rejected, and in any case, that it was wrong of the learned trial judge to have allowed PW10 and PW19, while giving evidence

A in court, to refer to their statements to the police and refresh their memory; (iv) the non-calling of Jayanthi as a witness was fatal to the prosecution's case; and (v) the identification parades had not been properly carried out by the police.

B **Held (dismissing appeal by first accused; allowing appeals by second, third and fourth accused and setting aside their conviction and sentence)**
Per Hasan Lah FCJ delivering the judgment of the court:

C **(1)** The Court of Appeal agreed with the findings and conclusion of the trial judge that the deceased was Manivanan and that Manivanan and Kalidash was one and the same person. It is trite that an appellate court does not interfere with the concurrent findings of fact of the courts below in the absence of very special circumstances. On the totality of the evidence, D the finding of the courts below as to the identity of the deceased is correct. (paras 45 & 46)

(2) The purpose of adducing the evidence and statement of Jayanthi made to PW7 was to establish the truth that the E body parts were that of the deceased. The object was not to establish the fact that it was made. Such evidence is therefore hearsay and inadmissible and was rightly rejected by the trial judge. The Court of Appeal had hence erred when it admitted that piece of evidence under s. 60(1)(b) of the Evidence Act F 1950. (para 43)

(3) On the facts of this case, s. 114(g) of the Evidence Act 1950 was not applicable and should not be invoked. PW22, the Investigating Officer, had made various efforts to trace G Jayanthi including by publishing a notice in a newspaper, Tamil Namban, but to no avail. There clearly was no intention on the part of the prosecution to suppress the evidence. Even without the evidence of Jayanthi, there was sufficient evidence to prove the identity of the body parts to be that of H Manivanan. Hence, the failure to call Jayanthi as a witness was not fatal to the prosecution's case. (para 47)

(4) There can be no general rule that a witness is to be allowed to refresh his memory only when his memory is faded. It is I within the trial court's discretion to allow a witness to refresh his memory. Cases showed that witnesses were allowed to be

shown their statements even before the trial. It is the duty of the trial judge to see that the court will not be deprived of the full testimony and information which it should have in order to do justice. In fact PW19 said in his evidence, after referring to his statement to the police, that he could not remember what he had said in his statement. It is also important to take into consideration the fact that both PW10 and PW19 gave evidence about five years after the incident. Surely, after a lapse of five years, PW10 and PW19 could not be expected to remember in detail what had taken place. The learned trial judge had thus properly exercised her discretion in allowing the prosecution to refresh the memory of these witnesses. (para 67)

(5) The fact that there are discrepancies in a witness's testimony does not necessarily make him an unreliable witness and make the whole of his evidence unacceptable. It is open to the court having observed the demeanour of the witness and after careful consideration of such discrepancies to accept part of the witness's evidence it considers true. To say that because a witness has been proved to be untrue on one or two points then the whole of his evidence 'must in law be rejected' is going too far and is wrong. In this case, the learned trial judge was entitled to accept that part of the evidence of PW10 and PW19 that were consistent with the statement that they had given to the police. As this involved on assessment of the credibility of witnesses, the learned trial judge was in a better position to do so and that an appellate court ought not to interfere with such findings. (paras 70 & 71)

(6) The court was unable to agree that the identification parades held were not in accordance with the guidelines laid down in *R v. Turnbull*. On the evidence, the identification parades had been properly conducted and there was no confusion as to the identification of the second, third and fourth accused made by PW10. (para 77)

(7) The circumstantial evidence adduced gave rise to one and only conclusion that it was the first accused who caused the death of the deceased. The evidence had established that the first accused was with PW9 when he accompanied PW9 to go to Ampang Tasek/Ampang Campuran to take Jayanthi who

ran away with the deceased, and while Jayanthi was taken to PW9's house, the deceased was taken to the first accused's house. There was then the evidence of PW19 who saw the deceased at 3.30pm and again at 9.30pm in the first accused's house, whereof, in the second of such encounters, PW9 saw the deceased lying on the floor dead and naked with a severed head. The first accused was then inside the room and the first accused also subsequently threatened PW19 not to report the matter to the police. As for PW10, he saw the first accused holding a knife when he went to the first accused's place between 9.30pm and 10.30pm and saw the third accused holding a parang and the deceased lying on the floor. The knife and parang, it ought to be noted, were recovered by the police in the drain at Jalan Pandan Indah based on the information given by the first accused to PW8. (paras 82-84)

(8) The court agreed with the learned trial judge that the first accused's defence was an afterthought. The learned trial judge had given a careful consideration to the defence, pertaining to the existence of Devadas, but rejected the defence on the ground that it was never raised by the defence during the prosecution's case, nor was the issue raised to any of the prosecution's witnesses during cross-examination. (para 88)

(9) There was insufficient circumstantial evidence, at the end of the prosecution's case, that the second to the fourth accused caused the death of the deceased in furtherance of a common intention. There was no evidence to prove that the second, third and fourth accused were present at the scene as confederates of the first accused. The prosecution had failed to establish a *prima facie* case against the second, third and fourth at the end of the prosecution's case on a maximum evaluation of the evidence and as such their defence should not have been called. (paras 86 & 87)

Bahasa Malaysia *Translation Of Headnotes*

Keempat-empat tertuduh dalam empat rayuan ini telah disabitkan atas kesalahan membunuh di bawah s. 302 Kanun Keseksaan dibaca bersama-sama dengan s. 34 Kanun yang sama dan dijatuhkan hukuman mati oleh Mahkamah Tinggi. Mereka dituduh melakukan kesalahan tersebut ke atas si mati, seorang warganegara

India bernama Manivanan a/l Vellaysamy ('Manivanan'), kelihatannya kerana Manivanan telah lari secara rahsia dengan adik perempuan tertuduh pertama ('Jayanthi'). Keterangan ikut keadaan seperti yang dikemukakan oleh pendakwaan menunjukkan bahawa tertuduh pertama (Mainthan) dan SP9 kemudiannya telah dapat menahan Manivanan di mana mereka membawanya ke rumah tertuduh pertama; bahawa SP9 kemudian pergi semula ke rumah tertuduh pertama dan di situ dia melihat: (a) keempat-empat tertuduh bersama-sama dengan beberapa orang lagi sedang meminum minuman keras dalam setor di belakang rumah tertuduh (b) tertuduh pertama semasa itu sedang memegang sebilah pisau sementara tertuduh ketiga sebilah parang, dan (c) seorang lelaki bernama Kalidash sedang terlantar di atas lantai dengan kepalanya berdarah; bahawa SP19, yang melintasi tepi setor berkenaan, melihat seorang lelaki tanpa pakaian terlantar di atas lantai dengan kepalanya hancur dan berlumuran darah, dan ekoran daripada itu, SP19 telah diancam oleh tertuduh supaya tidak memberitahu polis; bahawa sehari selepas insiden-insiden ini, beberapa bahagian badan Manivanan dijumpai di Jalan Mengkudu off Jalan Ampang; bahawa berdasarkan maklumat yang diberikan oleh tertuduh pertama, pihak polis menjumpai sebilah parang dan pisau dari sebuah longkang di Pandan Indah, serta bahagian-bahagian lain badan Manivanan dari sebuah tangki kumbahan di Pandan Jaya; dan bahawa cap jari Manivanan didapati sama dengan cap jari seorang warganegara India bernama Kalidash a/l Arumugam ('Kalidash') yang mempunyai rekod jenayah nombor 1567696. Selain itu, SP10 dan SP19 juga telah memberi kenyataan mereka masing-masing kepada polis mengesahkan keterlibatan keempat-keempat tertuduh dalam kejadian.

Keempat-empat tertuduh menafikan penglibatan mereka dalam pembunuhan. Secara intipatinya, cerita mereka adalah bahawa orang yang dipukul oleh tertuduh pertama dan ketiga adalah seorang yang bernama Devadas. Devadas, menurut mereka lagi, kemudian telah dibawa ke hospital oleh kakak dan abang ipar tertuduh ketiga dan dibenarkan pulang setelah diberi rawatan. Yang arif hakim bicara mendapati bahawa pembelaan keempat-empat tertuduh hanyalah suatu pembohongan dan rekaan, dan bahawa Manivanan atau Kalidash adalah orang yang sama, dan dengan itu, memutuskan keempat-empat tertuduh bersalah seperti pertuduhan. Tertuduh-tertuduh merayu ke Mahkamah Rayuan dan

setelah gagal merayu seterusnya. Di Mahkamah Persekutuan, tertuduh-tertuduh antara lain membangkitkan hujahan bahawa keputusan Mahkamah Tinggi dan Mahkamah Rayuan tidak boleh dipertahankan kerana: (i) ingredien bunuh gagal dibuktikan oleh pendakwaan; (ii) terdapat kesangsian mengenai identiti sebenar si mati; (iii) saksi-saksi penting pendakwaan, SP10 dan SP19, tidak boleh dipercayai dan keterangan mereka harus ditolak, dan walau apapun, bahawa adalah salah bagi yang arif hakim bicara membenarkan SP10 dan SP19, ketika memberi keterangan di mahkamah, merujuk kepada kenyataan yang mereka beri kepada polis bagi menyegarkan ingatan mereka; (iv) kegagalan memanggil Jayanthi sebagai saksi telah memudaratkan kes pendakwaan; dan (v) pihak polis gagal mengadakan kawad cam yang teratur.

Diputuskan (menolak rayuan tertuduh pertama; membenarkan rayuan tertuduh kedua, ketiga dan keempat dan mengenepikan sabitan dan hukuman mereka)
Oleh Hasan Lah HMP menyampaikan penghakiman mahkamah:

(1) Mahkamah Rayuan bersetuju dengan dapatan dan konklusi hakim bicara bahawa si mati adalah Manivanan dan bahawa Manivanan dan Kalidash adalah orang yang sama. Ianya sesuatu yang mantap bahawa terkecuali terdapat hal keadaan istimewa, mahkamah peringkat rayuan tidak akan campurtangan dengan dapatan-dapatan fakta yang dibuat oleh mahkamah-mahkamah di bawah. Berdasarkan keseluruhan keterangan, dapatan yang dibuat oleh mahkamah-mahkamah di bawah berkaitan identiti si mati adalah betul.

(2) Tujuan mengemukakan keterangan dan kenyataan Jayanthi yang dibuatnya kepada SP7 adalah bagi membuktikan kebenaran bahawa bahagian-bahagian badan yang dijumpai adalah kepunyaan si mati. Tujuannya bukanlah untuk membuktikan bahawa kenyataan tersebut ada dan telah dibuat. Keterangan tersebut dengan itu adalah keterangan dengar cakap dan telah ditolak dengan betulnya oleh hakim bicara. Dengan itu Mahkamah Rayuan khilaf bila ia menerima-masuk keterangan yang sama di bawah s. 60(1)(b) Akta Keterangan 1950.

(3) Berdasarkan fakta kes di sini, s. 114(g) Akta Keterangan 1950 tidak terpakai dan tidak harus digunakan. SP22, Pegawai Penyiasat, telah mengambil pelbagai langkah untuk mencari Jayanthi termasuk dengan menerbitkan notis dalam suratkhabar Tamil Namban, tetapi tidak berjaya. Adalah jelas bahawa tidak wujud apa-apa niat di pihak pendakwaan untuk menyorokkan keterangan. Walaupun tanpa keterangan Jayanthi, terdapat cukup keterangan bagi membuktikan bahawa bahagian-bahagian badan adalah kepunyaan Manivanan. Oleh itu, kegagalan memanggil Jayanthi tidak memudaratkan kes pendakwaan.

(4) Tidak ada kaedah am bahawa seorang saksi hanya boleh dibenarkan menyegarkan ingatannya bilamana ingatannya sudah mula pudar. Membenarkan seseorang saksi menyegarkan ingatannya adalah termasuk dalam budi bicara mahkamah bicara. Kes-kes menunjukkan bahawa saksi-saksi dibenarkan untuk ditunjukkan kenyataan mereka walaupun sebelum perbicaraan. Adalah menjadi tugas hakim bicara untuk memastikan bahawa mahkamah tidak dinafikan keseluruhan keterangan dan maklumat yang ia sepatutnya ada bagi menegakkan keadilan. Fakta menunjukkan bahawa SP19 mengatakan dalam keterangannya, setelah merujuk kepada kenyataannya kepada polis, bahawa dia tidak ingat apa yang dinyatakannya, dalam kenyataan tersebut. Adalah juga penting untuk menyedari bahawa fakta bahawa SP10 dan SP19 memberi keterangan mereka selepas lima tahun insiden berlaku. Pastinya, selepas lima tahun berlalu, SP10 dan SP19 tidak boleh diharap untuk mengingati secara terperinci apa yang berlaku. Yang arif hakim bicara dengan itu telah melaksanakan budi bicaranya dengan betul apabila membenarkan pendakwaan menyegarkan ingatan saksi-saksi ini.

(5) Fakta bahawa wujud percanggahan dalam testimoni seseorang saksi tidak semestinya menjadikannya seorang saksi yang tidak boleh dipercayai atau menjadikan keseluruhan keterangannya tidak boleh diterima masuk. Adalah terbuka kepada mahkamah, setelah melihat perilaku saksi dan menimbang percanggahan dengan telitinya, untuk menerima bahagian-bahagian keterangan saksi tersebut yang dianggapnya benar. Untuk berkata bahawa oleh kerana seseorang saksi itu didapati tidak berkata benar

atas satu atau dua perkara, maka keseluruhan keterangannya 'perlu ditolak di sisi undang-undang' adalah jauh tersasar dan salah. Dalam kes ini, yang arif hakim bicara berhak menerima masuk bahagian keterangan PW10 dan PW19 yang selaras dengan kenyataan yang mereka berikan kepada pihak polis. Oleh kerana ini melibatkan penilaian pada kredibiliti saksi-saksi, yang arif hakim bicara adalah dalam kedudukan yang lebih baik untuk berbuat sedemikian dan bahawa mahkamah peringkat rayuan tidak sewajarnya campurtangan dalam dapatan sedemikian.

(6) Mahkamah tidak bersetuju bahawa kawad cam yang diadakan tidak menepati panduan seperti yang diperkatakan oleh *R v. Turnbull*. Berdasarkan keterangan, kawad cam telah dilaksanakan dengan teratur dan tidak terdapat kekeliruan berkaitan pengenalan tertuduh kedua, ketiga dan keempat seperti yang dibuat oleh SP10.

(7) Keterangan ikut keadaan yang dikemukakan menunjukkan kepada satu dan hanya satu konklusi iaitu bahawa tertuduh pertamalah orangnya yang menyebabkan kematian si mati. Keterangan menunjukkan tertuduh pertama ada bersama SP9 apabila dia menemani SP9 pergi ke Ampang Tasek/Ampang Campuran untuk mengambil Jayanthi yang telah lari dengan si mati, dan sementara Jayanthi dibawa ke rumah SP9 si mati telah dibawa ke rumah tertuduh pertama. Kemudian terdapat keterangan SP19 yang melihat si mati pada jam 3.30 petang dan sekali lagi pada jam 9.30 malam di rumah tertuduh pertama, di mana, di kali kedua tersebut, dia melihat si mati terlantar bogel di atas lantai, dan mati dengan kepalanya bercerai dari badan. Tertuduh pertama ketika itu berada di dalam bilik tersebut dan dia juga kemudian telah mengugut SP19 supaya tidak melaporkannya kepada polis. Berkenaan SP10, dia melihat tertuduh pertama memegang sebilah pisau apabila dia pergi ke tempat tertuduh pertama antara jam 9.30 malam dan 10.30 malam dan melihat juga tertuduh ketiga memegang sebilah parang sementara si mati terbaring di atas lantai. Pisau dan juga parang, harus diingati, telah dijumpai oleh polis di dalam longkang di Jalan Pandan Indah ekoran dari maklumat yang diberikan oleh tertuduh pertama kepada SP8.

(8) Mahkamah bersetuju dengan yang arif hakim bicara bahawa pembelaan tertuduh pertama adalah suatu perancangan kemudian. Yang arif hakim bicara telah memberikan pertimbangan yang teliti kepada pembelaan, berhubung dengan kewujudan Devadas, tetapi telah menolaknya kerana ia tidak pernah dibangkitkan oleh pembelaan semasa kes pendakwaan, ataupun diajukan kepada mana-mana saksi pendakwaan semasa pemeriksaan balas.

(9) Tidak wujud cukup keterangan ikut keadaan, di akhir kes pendakwaan, bahawa tertuduh kedua hingga keempat telah menyebabkan kematian si mati ekoran daripada suatu niat bersama. Tidak terdapat keterangan untuk membuktikan bahawa tertuduh kedua, ketiga dan keempat berada di tempat kejadian sebagai sekutu tertuduh pertama. Atas penilaian maksima keterangan, pendakwaan gagal membuktikan kes *prima facie* terhadap tertuduh kedua, ketiga dan keempat dan pembelaan mereka tidak seharusnya dipanggil.

Case(s) referred to:
Khoon Chye Hin v. PP [1961] 1 LNS 41 HC ***(refd)***
Lau Pak Ngan v. R [1966] Crim LR 443 ***(refd)***
Lim Hong Yap v. PP [1978] 1 LNS 100 HC ***(refd)***
Mohamed Alias v. PP [1981] 1 LNS 200 HC ***(refd)***
Moomin Seman v. PP [1993] 4 CLJ 61 HC ***(refd)***
Muniandy Subramaniam v. PP [2006] 6 MLJ 623 ***(refd)***
Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***
Om Prakash v. State AIR [1956] All 241 ***(refd)***
R v. Richardson [1971] 2 All ER 773 ***(refd)***
R v. Turnbull [1976] 3 All ER 549 ***(refd)***
Tua Kin Ling v. PP [1970] 1 LNS 161 HC ***(refd)***
Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***
Yuen Chun Yii v. PP [1997] 3 SLR 57 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 112
Evidence Act 1950, ss. 60(1)(b), 61, 114(g), 154, 159
Penal Code, ss. 34, 302

Indian Evidence Act, s. 159

Other source(s) referred to:
Sarkar's Law of Evidence, 16th edn., 2006, p. 2465

(Cases No: 05-315-11-2011(B) & 05-317-11-2011(B))
For the appellants - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Tengku Amir Zaki Tengku Abdul Rahman; DPP

(Cases No: 05-314-11-2011(B) & 05-316-11-2011(B))
For the appellant - K Viknesvaran; M/s Viknes, Ratna & Co
For the respondent - Tengku Amir Zaki Tengku Abdul Rahman; DPP

[Appeal from Court of Appeal; Criminal Appeals No: B-05-176-2010, B-05-174-2010, B-05-177-2010 & B-05-175-2010]

Reported by Wan Sharif Ahmad

JUDGMENT

Hasan Lah FCJ:

Background

[1] All the four appellants were charged in the High Court at Shah Alam for the offence of murder under s. 302 of the Penal Code read together with s. 34 of the same Code. They, together with three other persons were alleged to have committed the murder of one Manivanan Vellaysamy (No. passport: E 2068544) between 9 August 2004 and 10 August 2004 at No. 136, Jalan Pandan 1, Pandan Jaya, Ampang Jaya, Selangor Darul Ehsan.

[2] They were found guilty of the offence as charged, convicted and sentenced to death. Their appeals to the Court of Appeal were dismissed and they now appeal to this court.

[3] For the purpose of this judgment, the appellant in No: 05-315-11/2011(B), that is Mainthan Arumugam will be referred to as the first accused, the appellant in No: 05-317-11/2011(B), that is Yuganathan Tharumaputrintar will be referred to as the second accused, the appellant in No: 05-314-11/2011(B), that is Adiswaran Tharumaputrintar will be referred to as the third accused and the appellant in No: 05-316-11/2011(B), that is A Param Sivam K Alagan will be referred to as the fourth accused.

Case For The Prosecution

[4] Manivanan Vellaysamy was an Indian National holding Indian Passport No: E 2068544. At the material time, he worked with Muniandy Nadeson (PW9). Manivanan ran away with PW9's sister-in-law, Jayanthi Vadivelloo. About three weeks after their disappearance PW9 was informed by his friend, S Peter Thomas Savarinayagam, that Manivanan and Jayanthi were seen in a shop in Ampang Tasek or Ampang Campuran.

[5] Upon receiving this information PW9 and the first accused proceeded to the said shop. Both the deceased and Jayanthi were brought back in PW9's motor car. The deceased was dropped at the first accused's house, while Jayanthi was brought back to PW9's house. PW9 came to know about the deceased's death when he was arrested by the police.

[6] PW10, Giva Govindan, testified that in the evening of 9 August 2004 he went to the first accused's house to send a wedding invitation card at Jalan Pandan Jaya, Selangor. He went to the store behind the house. When the door of the store was opened he saw a few persons drinking. Among them were the four accused. At first he said he only saw the bottles of liquor on the floor in the store. After his attention was drawn to his statement under s. 112 of the Criminal Procedure Code, he said he saw a male person lying in a room behind the workshop, whose head was bleeding. He also saw the first accused holding a knife and the third accused holding a parang. PW10 also saw the second accused and the fourth accused there.

[7] PW19 (Lai Tai Pin) rented part of the building in Pandan Jaya from the first accused about one and half years before the month of August 2004 and operated his motorcycle workshop at the premises. According to PW19, the other part of the premises was used by the first accused to keep scrap metal. He stayed there as well as in a house at Peel Road.

[8] On 9 August 2004 at about 8.30pm while he was in his workshop PW19 heard some noises from the first accused's store for about ten minutes. At about 9pm he went out through the backdoor of his workshop to go to the toilet. On his way back from the toilet to his workshop he saw the first accused in his

A office as the door to the store was then open. He also saw a naked body whose head was smashed and covered with blood lying on the floor. He then went back to his workshop.

[9] According to PW19, about five minutes later the first
B accused asked him to go to the first accused's store where he saw a body lying on the floor. The first accused pointed a knife to his neck and warned him not to inform the police.

[10] On 10 August 2004 burnt human body parts consisting of a head and a pair of arms were found at Jalan Mengkudu off Jalan
C Ampang. These body parts were sent to the pathologist (PW7) for autopsy. Jayanthi identified these body parts to PW7 as Manivanan based on the rings on his fingers and colourful strings tied to the hand which Jayanthi claimed was given by her to Manivanan.
D

[11] Based on the post-mortem carried out on the body parts PW7 was of the opinion that the cause of death was multiple slash wounds to the head. The DNA carried out on the bone specimens of the head, right and left humerus confirmed that the
E head and the pair of arms belonged to one and the same person.

[12] From the evidence of PW15, the fingerprint expert, who was tasked with ascertaining the fingerprint of the deceased by adopting the comparative approach between the specimen
F obtained from the body parts and the criminal records at Bukit Aman, PW15's finding was that the fingerprint matched that of Indian national by the name of Kalidash Arumugam who had a criminal record number 1567696.

G **[13]** A few days later after the discovery of the head and limbs the first accused was arrested with a few others, including Jayanthi.

[14] On 15 August 2004 based on information given by the first accused, C/Inspector Mohd Noah (PW8) recovered a parang and
H a knife from a drain near a second hand shop at Jalan Pandan Indah, Kuala Lumpur. From a nearby sewerage tank at Pandan Jaya PW8 recovered body parts consisting of a pair of lower limbs and a white plastic bag containing a human torso. These body parts were later sent to PW7 for an autopsy.
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Case For The Defence

[15] The first accused denied having caused the death of anyone. He knew the deceased. He did see the deceased with Jayanthi on 9 August 2004. After seeing them he brought them together with PW9 back to Pandan Indah, Kuala Lumpur. After that PW9 took the deceased and Jayanthi away. Later when the first accused asked PW9 about the deceased PW9 told him that he had left the deceased near a temple. According to the first accused PW9 did that because he wanted to avoid unnecessary problems as the deceased had a police record.

[16] The first accused claimed that the person whom PW19 saw at his premises on 9 August 2004 was one Devadas. Devadas was a drug addict. He was brought there by the second accused as the first accused wanted to find out whether Devadas was the person who stole certain items from the first accused's premises and PW19's workshop. Devadas was beaten with rattan and iron because he refused to admit. The first accused claimed that PW19 also beat Devadas. That caused injuries to Devadas's head. Devadas was later sent to the hospital by the third accused's sister and brother-in-law for treatment.

[17] The first accused said the knife and the parang recovered did not belong to him. He knew where the knife and the parang were recovered by the police as he witnessed the police recovering them in the drain in front of his premises.

[18] The first accused also testified that the police took him to a place where the police recovered the lower limbs and a white plastic bag containing human torso. He denied giving any information to the police relating to the knife, parang and the body parts.

[19] The second accused testified that he worked for the first accused as a lorry driver about one year before his arrest. He denied that he was involved in the murder of the deceased.

[20] According to the second accused on 9 August 2004 at about 6pm he went back to the first accused's store from Sg. Besi. At that time the first, third accused and three other persons were in the store drinking liquor. He did not join them.

[21] At about 7pm he went to the first accused's office to give him the key to the store. The first accused asked him to find Devadas and bring him to the store. He found Devadas and brought Devadas to see the first accused. He then went home and did not go back to the store again that night.

[22] The third accused testified that he too worked for the first accused. On 9 August 2004 he went to Ampang Tasek with PW9 and the first accused on his motorcycle. He saw a woman and an Indian man getting into the car driven by the first accused. They went back to the first accused's store.

[23] The first accused later came to the shop. He saw the Indian man in the temple after PW9 left the place. According to the third accused, the first accused and his other workers, namely, Baitumalai, Sivachandaran and Glen went to the temple to see the Indian man. After that Baitumalai, Sivachandran and Glen left the temple with the Indian man on two motorcycles. He did not see the Indian man after that.

[24] The third accused confirmed that there was a drinking session that evening in the store. He also confirmed the second accused's testimony about Devadas, that the second accused brought Devadas to the store after which the second accused left.

[25] According to the third accused initially only the first accused and PW19 beat Devadas with a rattan stick inside the first accused's office because Devadas refused to admit to stealing goods from the first accused's store. Later, the third accused and the first accused beat Devadas with a rattan stick and iron and a bottle. Devadas was subsequently sent to the hospital by the third accused's sister and brother-in-law.

[26] He denied holding a knife that evening in the first accused's store. He also did not see any parang that evening. He also denied injuring any other person other than Devadas. He also denied killing an Indian man.

[27] The fourth accused testified that on 9 August 2004 he went to the first accused's store at about 6pm to celebrate the birthday of one of the first accused's workers. At the first accused's store they consumed liquor. He did not go into the first accused's office.

He heard noises from the first accused's office. When he enquired about the noise from the first accused's office he was told that the first accused was beating a thief inside the office.

[28] According to the fourth accused PW10 came to the store that evening while they were drinking. PW10 joined them and he (PW10) was there for about half an hour. The fourth accused left the first accused's store together with PW10 after 9pm.

[29] DW5 (John Francis), the brother-in-law of the second and the third accused, testified that on 9 August 2004 at about 10pm the third accused came to his house and asked him to send Devadas to the hospital because Devadas was beaten by the third accused and his friends. DW5 sent Devadas to Kuala Lumpur General Hospital that evening. After Devadas was given medical treatment DW5 sent Devadas back to his house.

Findings Of The High Court

[30] Having perused the evidence adduced by the prosecution with care the learned trial judge, at the close of the case for the prosecution, made a finding that the dead body cut into six parts belonged to Manivanan Vellaysamy who was also known as Kalidash Arumugam. The judge also made a finding that the four accused persons acted with common intention to cause the death of Manivanan Vellaysamy. The learned trial judge therefore found at the close of the case for the prosecution that a *prima facie* case had been made up against all of the four accused of the offence charged.

[31] With regard to the defence case the learned trial judge ruled that the defence of all the four accused was an afterthought and mere concoctions. The defence did not raise any reasonable doubt in the prosecution's case. Accordingly the learned trial judge concluded that the prosecution had proved its case against all the four accused beyond reasonable doubt.

Finding Of Court Of Appeal

[32] Before the Court of Appeal the four accused persons raised two main grounds in their appeals. Firstly, it was contended that the prosecution's evidence had not proved the ingredients of the offence of murder; secondly, that the learned trial judge erred in

admitting inadmissible evidence. The appeal by the four accused was dismissed by the Court of Appeal as it did not find any error in the learned trial judge's findings and conclusion nor any flaw in her application of the legal principles.

The Appeal

[33] Before us Mr Hisyam Teh Poh Teik, learned counsel for the first and second accused, canvassed two main grounds for their appeals, namely:

(a) the identity of the deceased as per the charge had not been proven; and

(b) the prosecution's key witnesses namely, PW10 and PW19, were unreliable and their evidence ought to be rejected.

[34] Learned counsel for the third and fourth accused, Mr K Viknesvaran, raised the following four main issues:

(a) whether the prosecution had established the ingredients of the offence and whether the third and fourth accused were involved;

(b) the effect of non-calling of Jayanthi as a witness;

(c) whether the Court of Appeal had failed to appreciate the issue of identification; and

(d) the manner in which the identification parades had been carried out.

[35] Ground (a) of the first and the second accused's appeal and ground (a) and (b) of the third and the fourth accused's appeals overlap and will be dealt with together. Mr Hisyam submitted that the prosecution failed to prove that the identity of the body parts was in fact Manivanan for the following reasons. Firstly, Jayanthi, who was the best person to establish the deceased's identity, could not be called by the prosecution to give evidence. PW7's evidence that Jayanthi identified the deceased as Manivanan on 11 August 2004 at about 10am in the hospital's mortuary in his presence was held to be hearsay and inadmissible by the learned trial judge.

[36] Secondly, the other evidence could not support the identity of the body parts recovered to be that of Manivanan Vellaysamy. According to Mr Hisham, PW9 and PW20 were not brought to the mortuary to identify the deceased. PW9 knew one Manivanan as one of his workers but this did not mean the body parts recovered was Manivanan.

[37] Thirdly, PW15 who made the fingerprint comparison made a finding that the sample fingerprint taken from the deceased matched to that of one Kalidash Arumugam, an Indian national who had a criminal record no. 1567696. The passport given by Jayanthi was Manivanan's not Kalidash. There was no evidence that Kalidash and Manivanan was one and the same person.

[38] Fourthly, the DNA analysis of the specimen revealed two different identities. PW7 also confirmed that the DNA of the abdomen differed from that of the head and hands. In fact, PW7 conceded that it was difficult to determine the identity of the deceased.

[39] On the same issue, Mr Viknesvaran further submitted that the Court of Appeal had erred in finding that Manivanan was Kalidash as there was no evidence to verify that Kalidash was Manivanan. It was also submitted that since Jayanthi was a material witness in this case, the failure to call her would give rise to an adverse inference under s. 114(g) of the Evidence Act 1950. PW9, the brother-in-law of Jayanthi, stated in his evidence that Jayanthi was in Penang.

[40] Learned Deputy Public Prosecutor submitted that the evidence of PW7 on what was said by Jayanthi to him can be accepted under s. 61 of the Evidence Act 1950. In support of this proposition the learned Deputy Public Prosecutor cited the decision of the Court of Appeal in *Muniandy Subramaniam v. PP* [2006] 6 MLJ 623.

[41] In *Muniandy*'s case the Court of Appeal, at p. 639 observed:

> PW7's evidence in relation to the above is not hearsay and is admissible as it was proposed to establish the fact that the statement, ie that the appellant was in the said residence, was made and not the truth of the statement. In the oft cited Privy Council case of *Subramaniam v. Public Prosecutor* [1956] MLJ 220, which dealt with a similar circumstance, Mr LMD De Silva said (at p 222):

> In ruling out peremptorily the evidence of conversation between the terrorists and the appellant the trial judge was in error. Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and is inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.

In the instant appeal, the learned trial Judge admitted the evidence in relation to the conversation between PW7 and the deceased pursuant to s. 60(1)(b) of the Evidence Act 1950 which reads:

> (1) Oral evidence shall in all cases whatever be direct, that is to say:
>
> (b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;.

[42] In the instant appeal PW7's relevant evidence is as follows (at p. 43 of the appeal record):

> Pada 11.8.2004 jam lebih kurang 10.00 pagi, saya berada di bilik mayat Hospital Universiti Kebangsaan Malaysia melakukan bedah siasat ke atas kepala dan tangan si mati yang telah dikenalpasti kepada saya oleh ASP Mohamad bin Hj Laham No. Polis G/9855 dan juga seorang wanita India yang bernama Jayanthi d/o Vadiveloo I.C. 800224075462 di mana beliau telah mengenal pasti jasad tersebut sebagai Mani Vanan Vellay Samy dengan passport India E2068544.
>
> Pada proses pengecaman Jayanthi telah mengenal pasti satu cincin pada jari keempat tangan kanan simati bertulis perkataan "love". Selain daripada itu terdapat satu lagi cincin dengan 4 baris selari pada jari kelima tangan kanan si mati. Kedua-dua cincin itu adalah pemberitan Jayanthi kepada Mani Vanan semasa beliau masih hidup. Terdapat satu tali (string) berbagai warna pada bahagian hasta kanan di pergelangan tangan kanan. Saya baca dari laporan yang saya telah sediakan setelah saya menjalankan post mortem.

[43] From our understanding, the purpose of adducing the evidence of the statement of Jayanthi made to PW7 was to establish the truth that the body parts were that of the deceased. The object was not to establish the fact that it was made. Such evidence is therefore hearsay and inadmissible and was rightly rejected by the learned trial judge. As such we are of the view that the Court of Appeal had erred when it admitted that piece of evidence under s. 60(1)(b) of the Evidence Act 1950.

[44] The learned trial judge, after evaluating the evidence of PW7, PW9, PW15 and PW18, concluded that the deceased was Manivanan Vellaysamy and that Manivanan Vellaysamy and Kalidash Arumugam was one and the same person. At paras. 30, 31 and 32 of her judgment the learned trial judge said:

> 30. Bagi saya, setelah saya meneliti keterangan SP21 itu, adalah jelas bahawa keterangan SP7 mengenai perbezaan profil DNA bagi jasad set kedua berbanding dengan profil DNA bagi jasad set pertama adalah disebabkan oleh bakteria dan organisma yang lain yang boleh menukar dan menyebabkan "degeneration" DNA yang diambil itu setelah jasad set kedua itu terendam dalam air tanah dan najis dalam loji kumbahan itu adalah sangat bermunasabah dan sebenarnya tidak bercanggah dengan keterangan SP21, yang juga telah memberi alasan mengapa beliau (SP21) tidak dapat profil DNA bagi tulang "N(B)" itu ialah kerana tulang itu telah membusuk atau rosak. Oleh yang demikian saya menerima keterangan SP7 bahawa jasad set pertama dan jasad set kedua adalah datangnya daripada orang yang sama setelah mengambil kira bukti-bukti lain dan sebagaimana yang saya telah memperincikan sebelum ini.
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> 31. Adalah juga dapatan fakta saya bahawa berdasarkan keterangan SP7, SP15, SP9 dan SP18, Manivanan Vellaysamy itu juga dikenali sebagai Kalidash a/l Arumugam rekod jenayah nombor 1567696. Mengikut keterangan SP15 beliau telah menerima permohonan (P22) untuk membuat perbandingan cap jari daripada SP18 pada 12.8.2004 (cap jari tangan kanan Si Mati telah diambil oleh SP7 sebelum itu). Hasil pemeriksaan dan perbandingan ke atas cap jari itu beliau dapat kesan ianya atas nama Kalidash a/l Arumugam, rekod jenayah nombor 1567696, seorang warga negara India (P23). Bahawa Kalidash a/l Arumugam telah dituduh dan dihukum di bawah seksyen 224 Kanun Keseksaan pada 2.11.2001.

A 32. Berdasarkan apa yang saya telah nyatakan di atas, saya mendapati pihak pendakwaan telah berjaya membuktikan identiti Si Mati sebagai Manivanan Vellaysamy Passport India E2068544 yang juga adalah dikenali sebagai Kalidash a/l Arumugam dan bahawa jasad beliaulah yang dijumpai terpotong kepada 6 B bahagian, iaitu jasad set pertama dan set kedua, dan dengan itu terbuktilah kematian beliau.

[45] It is pertinent to note that the Court of Appeal agreed with the findings and conclusion of the learned trial judge that the deceased was Manivanan Vellaysamy and that Manivanan C Vellaysamy and Kalidash Arumugam was one and the same person. It is trite that an appellate court does not interfere with the concurrent findings of fact of the courts below in the absence of very special circumstances.

D **[46]** On the totality of the evidence adduced we find the finding of the courts below as to the identity of the deceased to be correct. We therefore find that both counsel's submission on this point to be devoid of any merit.

E **[47]** As regards the issue of whether an adverse inference ought to be invoked against the prosecution for failure to produce and call Jayanthi as its witness, we are of the view that on the facts of this case s. 114(g) of the Evidence Act 1950 was not applicable and should not be invoked. ASP Radzali bin Abu Hassan (PW22), F the investigating officer, had made various efforts to trace Jayanthi including publication of a notice in a newspaper, Tamil Namban, but to no avail. There clearly was no intention on the part of the prosecution to suppress the evidence. Even without the evidence of Jayanthi the learned trial judge was of the view there was G sufficient evidence to prove the identity of the body parts to be that of Manivanan. Thus, the failure to call Jayanthi as a witness was not fatal to the prosecution's case.

[48] We now deal with the second issue raised by Mr Hisyam relating to the credibility of the prosecution's main witnesses, H PW10 and PW19. It was contended that their evidence should have been rejected by the learned trial judge on the ground that their evidence were marred by major contradictions and discrepancies.

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[49] In the earlier part of his evidence PW10 said that in the evening he went to the accused's store and he did not see anything except for the liquor's bottles. However, after his attention was referred to his statement under s. 112 of the Criminal Procedure Code, he said there was a naked man lying in a room behind the motor workshop. When PW10 was asked to explain this contradiction he said that what was said in his s. 112 statement was the truth; he saw the first accused holding a knife whilst the third accused was holding a parang.

[50] With regard to these contradictions the learned trial judge said:

> keterangan SP10 adalah antara keterangan yang terpenting dalam kes ini yang dapat menentukan atau tidak penglibatan keempat-empat Tertuduh itu dalam pembunuhan Si Mati. Saya dapati keterangan SP10 memang ada banyak percanggahan sesamanya. Saya berpendapat bahawa di banyak tempat percanggahan itu disengajakan kerana SP10 takut memberi keterangan yang sebenarnya. Namun saya telah menelitikan keterangan SP10 dan setelah beberapa nasihat diberi oleh saya serta beliau dibenarkan merujuk kepada kenyataannya yang diberi kepada pihak polis sebagai menyegarkan ingatannya, saya dapati saya boleh menerima sebahagian keterangannya sebagai keterangan yang benar. Keterangan SP10 yang diterima oleh saya adalah seperti berikut.

[51] Mr Hisyam submitted that the learned trial judge had erred in allowing PW10 to refresh his memory. Refreshing memory under s. 159 of the Evidence Act 1950 was only permissible when the witness is unable to speak from his memory. In support of that proposition Mr Hisyam cited the cases of *Yuen Chun Yii v. Public Prosecutor* [1997] 3 SLR 57 and *Moomin Seman v. Public Prosecutor* [1993] 4 CLJ 61; [1993] 3 MLJ 282. In this regard it was contended that the correct procedure that should have been adopted was for the prosecution to cross-examine PW10 pursuant to s. 154 of the Evidence Act 1950.

[52] It was further submitted that there were glaring contradictions between PW10's oral evidence and his s. 112 statement. The learned trial judge did not ask PW10 to explain the contradictions and then make a ruling whether the explanation was acceptable or otherwise. What the learned trial judge did in this case was to sieve through PW10's evidence and accepted part of it.

[53] Further, Mr Hisyam submitted that as PW10 was also at the scene and had also been arrested, he had every reason to exculpate himself to secure a release. His evidence therefore ought to have been rejected by the learned trial judge.

[54] With regard to PW19's evidence, it was contended that there were material inconsistencies in his evidence. Earlier in his evidence PW19 testified that he saw the first accused in his (the first accused) store at about 9pm. He then said he did not see the first accused but he only heard the first accused's voice from the store. Later, when he was allowed to refresh his memory by referring to his statement made to the police he changed his story to say that he saw the first accused and a body inside the office of the store. Similarly, it was argued that the learned trial judge had adopted a wrong procedure in allowing PW19 to refresh his memory as there was no evidence at all that PW19 was unable to remember the incident and that he required reference to his police statement.

[55] Mr Hisyam also highlighted two main contradictions between the evidence of PW10 and PW19. Firstly, on the number of persons in the store. According to PW10 there was between 20 to 30 persons, each of them holding bottles in their hands whereas PW19 said there were only two or three persons there. Secondly, PW10 said he saw a body there and he was not sure whether the person lying down was drunk, naked or bleeding. PW19, on the other hand, said the body was naked, its head chopped off, leaving only the torso.

[56] It was also submitted that the subsequent conduct of PW19 did not lend credence to his version of the events. After witnessing a dead body whose head was severed from the body, and threatened with death or injury by the first accused, his reaction was to go to his room to sleep as if nothing had happened.

[57] In relation to this, Mr Viknesvaran submitted that there was no evidence by any of the prosecution's witnesses that the murder took place at Kedai Bengkel Motosikal No. 136, Jalan Utama, Jalan Pandan 1, Pandan Jaya as stated in the charge as there was no blood of the deceased recovered at that place. Further, there was no evidence of any DNA samples matching that of the third and fourth accused.

[58] The statutory provision relating to refreshing a witness's memory is s. 159 of the Evidence Act 1950 which provides as follows:

> (1) A witness may while under examination refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory.

[59] In *Yuen Chun Yii v. Public Prosecutor* (*supra*) Yong Pung How CJ made the following observation at p. 63 of the report:

> 21. When a party examining his own witness attempts to invoke s. 161 EA to refresh the memory of that witness, the basic premise, apart from the conditions set out in s. 161, is that his memory has faded, causing him to forget certain details about the evidence he intends to give. The witness is allowed to refresh his memory because a witness should not suffer from an unintended mistake, and may explain an inconsistency: *Halliday v. Holgate* 17 LT 18. Where he testifies to facts mentioned in the document referred to under s. 161, provided he accepts that the facts were correctly recorded, these facts become his testimony: s. 162 EA.
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> 22. In the present case, Chia had never said that he had suffered a lapse of memory. Before me, the DPP confirmed that he had wanted to refresh Chia's memory because Chia had said something potentially inconsistent with his CPIB statement, namely, that he 'did not tell the [appellant] anything about his role in respect of the transfer of the units'. This was perceived to be in conflict with the prosecution's case as reflected in 25 of Chia's CPIB statement, wherein Chia had stated that he had told the appellant that the money was given for his assistance in the matter.
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> 23. There must be a demonstrated need for the witness to refer to a memory-refreshing document, and it would not be proper to grant leave to refer to such a document simply because a request was made by the prosecution: see *Hetherington v. Brooks* [1963] SASR 321. No reasons were apparently given as to why Chia's memory had to be refreshed. At any rate, no reasons appear from the record, and it would seem that the district judge acceded unquestioningly to the DPP's request.

[60] In *Moomin Seman v. Public Prosecutor* (*supra*) the High Court had the occasion to consider s. 159 of the Evidence Act 1950. At p. 287 of the report Richard Talalla J observed:

> A witness testifying in court should initially speak from memory, unaided, and it is only when the witness finds that that cannot be done, recourse is sought to the writing. Otherwise the writing may be relied on in place of that expressed from memory and the two may not at the time of testifying be the same. See the observation of Winslow J in *Sebastian v PP.*[1] Indeed, such a course has been recognized by the legislature as manifested by ss. 159-161 of the Act.
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> The statutory provisions for refreshing memory are by reference to s. 159, conditioned. The first condition is that the writing by which the memory of a witness is to be refreshed must have been made by the witness himself or if by any other person then the writing must have been read by the witness and at the time of such reading known by the witness to be correct. A second condition is that the writing when made, or read and known as the case may be had to be so done at the time of the transaction concerning which the witness is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory notwithstanding that the first condition may have been met. A witness cannot so refresh his memory by right. It is within the discretion of the court whether or not to allow it. The discretion of course will be exercised upon a consideration of all the facts and circumstances at a particular time pertaining.
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> It will be seen by reference to s. 159(1) and (2) of the Act that the writing is of a transaction concerning which the witness is questioned. As I see it, the statutory safeguards exist to ensure that the writing is a true record of the perception of the witness of a thing the witness is to testify to and not a distortion of the truth contrived by the questioner or others having an interest in the witness not telling the truth.

[61] In *Moomin*'s case Richard Talalla J referred to the decision of the Supreme Court of Hong Kong in *Lau Pak Ngan v. R* [1966] Crim LR 443 and summarised the observations made by Hogan CJ as follows:

> (1) The ideal might well be that witnesses should be able, without aid of reference to statements or notes made at a time closer to the events in questions, to recall with clarity and accuracy the details of earlier events but witnesses are

human beings and, as such, apt to forget the details of events as time goes by. If a witness is denied reasonable opportunities of refreshing his memory in the way ordinary men of affairs refresh theirs, a danger must arise that the courts will be unnecessarily deprived of the full testimony and information which they should have in order to do justice. There is, we think, a greater danger of this than of encouraging or facilitating untruthful testimony by permitting access to earlier statements.

(2) One must, of course, recognize that a witness may not wish to refresh his memory and if, in such circumstances, any pressure is used to make him do so, allegations of coaching may be difficult to refute. Moreover, we think it is undesirable that statements of witnesses should be read over to them in each other's company when each is able to hear what the other has said and we would deprecate such a practice.

(3) If a police officer – or indeed anyone connected with a case – enters unnecessarily into conversation with a witness as to his or her evidence during an adjournment of the witness's testimony, the officer at once exposes himself and the witness to the suggestion that the evidence subsequently given is in some way affected by such conversation and possibly distorted so as to present a picture more favourable to one side.

(4) Anything in the nature of coaching a witness in the evidence he is expected to give would be most reprehensible and would call for condemnation.

[62] In *R v. Richardson* [1971] 2 All ER 773, Sachs LJ, in delivering the judgment of the Court of Appeal, at pp. 776 and 777 of the report, observed as follows:

> Indeed the only case which has a direct bearing on this issue is one which was decided not in this country but on appeal in the Supreme Court of Hong Kong in 1966: *Lau Pak Ngam v. R*, which is compactly reported. In the view of each member of this court it contains some sage observations, two of which are apt to be quoted. One of them is:
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> > Testimony in the witness box becomes more a test of memory than of truthfulness if witnesses are deprived of the opportunity of checking their recollection beforehand by reference to statements or notes made at a time closer to the events in question.

A The other:

> Refusal of access to statements would tend to create difficulties for honest witnesses but be likely to do little to hamper dishonest witnesses.

B With those views this court agrees. It is true that by the practice of the courts of this country a line is drawn at the moment when a witness enters the witness box and when giving evidence there in chief he cannot refresh his memory except by a document which, to quote the words of Phipson on Evidence, 'must have been written either at the time of the transaction or so shortly C afterwards that the facts were fresh in his memory'. (Incidentally, that definition does provide a measure of elasticity and should not be taken to confine witnesses to an over-short period.) It is moreover a practice which the courts can enforce, when a witness is in the box the court can see that he complies with that D practice. The courts, however, must take care not to deprive themselves by new, artificial rules of practice of the best chances of learning the truth. The courts are under no compulsion unnecessarily to follow on a matter of practice the lure of the rules of logic in order to produce unreasonable results which would hinder the course of justice. Obviously it would be wrong E if several witnesses were handed statements in circumstances which enabled one to compare with another what each had said. But there can be no general rule (which incidentally would be unenforceable, unlike the rule as to what can be done in the witness box) that witnesses may not before trial see the F statements they made at some period reasonably close to the time of the event which is the subject of the trial. Indeed one can imagine many cases, particularly those of a complex nature, where such a rule would militate very greatly against the interests of justice.

G **[63]** In *Lim Hong Yap v. PP* [1978] 1 LNS 100; [1978] 1 MLJ 154, the Singapore Court of Criminal Appeal considered and applied the judgment in *Richardson*'s case and held that there can be no general rule that witnesses may not before trial see their statements made at some period reasonable close to the time of H the event.

[64] In *Sarkar's Law of Evidence*, 16th edn. 2006 at p. 2465 the following commentary was made on s. 159 of the Indian Evidence Act:

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> Ordinarily a witness deposes to facts from the recollection but memory fades and it is therefore very necessary that he should be allowed to assist his memory by looking at documents containing an account of them if there be any. This is known as refreshing memory. A reference to the written memoranda has the effect of reviving in his mind a recollection of the facts recorded therein. A witness may through lapse of memory, be honestly making a statement contrary to what is contained in the written memorandum. He is allowed to refresh his memory because a witness should not suffer from a mistake, and may explain an inconsistency [per Montagus Smith J, in *Halliday v. Holgate*, 17 LT 18]...

[65] Turning to the facts of the instant case, the learned trial judge allowed the prosecution to refer PW10 and PW19 to their statements made to the police on the application by the learned Deputy Public Prosecutor. As can be seen from the notes of proceedings the application was made when the oral testimony of the PW10 and PW19 contradicted their respective statement made to the police.

[66] The main complaint by Mr Hisyam against the decision taken by the learned trial judge in allowing these two witnesses to refresh their memory was that it was allowed not because the witnesses were unable to speak from memory. PW10 was allowed to refresh his memory because he was in a state of fear, and as for PW19, there was no evidence that he was unable to remember the incident or that he required reference to his previous statement.

[67] Looking at the cases mentioned earlier we are of the view that there can be no general rule that a witness is to be allowed to refresh his memory only when his memory has faded. It is within the trial court's discretion to allow a witness to refresh his memory. Cases show that witnesses were allowed to be shown their statements even before the trial. It is the duty of the trial judge to see that the court will not be deprived of the full testimony and information which it should have in order to do justice. In fact, PW19 said in his evidence (p. 131 of the appeal record), after referring to his statement to the police, that he could not remember what he had said in his statement. It is also important to take into consideration the fact that both PW10 and PW19 gave evidence about five years after the incident, ie, in

2009 whereas the offence was committed in 2004. Surely after a lapse of five years PW10 and PW19 could not be expected to remember in detail what had taken place. We are therefore of the view that the learned trial judge had properly exercised her discretion in allowing the prosecution to refresh the memory of these two witnesses, PW10 and PW19.

[68] On the issue of the contradictions in the evidence of PW10 and PW19, the learned trial judge had carefully considered them and decided to accept part of their evidence which were consistent with the statements given to the police. The learned trial judge accepted PW10's evidence that he (PW10) went to the first accused's store at about 9.30pm to 10pm on 9 August 2004 and of all of the four accused being there. PW10 saw the first accused holding a knife and the third accused holding a parang. PW10 also saw a naked Indian man lying in a room behind the motor workshop whose head was bleeding.

[69] With regard to PW19's evidence, the learned trial judge accepted, among others, the evidence that on 9 August 2004 at about 9pm of the first accused being inside his (the first accused) office and a naked man lying on the floor whose head was severed. (p. 131 of appeal record).

[70] It is trite law that the fact that there are discrepancies in a witness's testimony does not necessarily make him an unreliable witness and make the whole of his evidence unacceptable. It is open to the court having observed the demeanour of the witness and after careful consideration of such discrepancies to accept part of the witness's evidence it considers true (*Mohamed Alias v. Public Prosecutor* [1981] 1 LNS 200; [1983] 2 MLJ 172). If a witness demonstrably were to lie on one or two points, then it is clear that he is not a reliable witness and as a matter of prudence, the rest of his evidence must be scrutinised with great care, and indeed, with suspicion. To say, however, that because a witness has been proved to be untrue on one or two points then the whole of his evidence 'must in law be rejected' is going too far and is wrong (*Khoon Chye Hin v. Public Prosecutor* [1961] 1 LNS 41; [1961] 1 MLJ 105). It is the duty of the court to sieve through the evidence and to ascertain which part of the evidence incriminating the accused could be accepted. (*Tua Kin Ling v. Public Prosecutor* [1970] 1 LNS 161; [1970] 2 MLJ 61).

[71] The learned trial judge, after having scrutinised with great care the evidence of PW10 and PW19, had accepted parts of their evidence which were consistent with the statements given by them to the police. In our view the learned trial judge was entitled to do so and as this involved on assessment of the credibility of witnesses, the learned trial judge was in a better position to do so and that an appellate court ought not to interfere with such findings.

[72] On the manner the identification parades had been conducted Mr Viknesvaran submitted that they were not conducted in accordance with the procedure laid down in *R v. Turnbull* [1976] 3 All ER 549. According to Mr Viknesvaran the requirements relating to the persons participating in the identification parades had not been complied with as there were no mention of their build nor height by the officer conducting the identification parades.

[73] From the evidence adduced, ASP Syed Mohd Azam bin Syed Ibrahim (PW14) conducted three separate identification parades on 22 September 2004, 31 May 2005 and 9 March 2006. On 22 September 2004 the identification parade was conducted for the purpose of the identification of the second accused. The only information given by PW14 on the persons who participated in that identification parade was that all the participants were Indians, aged between 18 and 31 years old. There were ten participants excluding the second accused. PW19 could not identify the second accused but PW10 could identify the second accused as one of the persons who were drinking liquor at the 1st accused's store.

[74] With regard to the identification parade held on 31 May 2005, PW14's evidence was that its purpose was for the identification of the third accused and another suspect by the name of Arun Maruthairajan by PW10. There were 15 participants who were Indians aged between 18 and 30 years old. PW10 identified both of them as among the persons at the first accused's store.

[75] On 9 March 2006, PW14 conducted the third identification parade for PW10 in respect of the identification of the fourth accused. There were ten participants who were Indians. PW10 identified the fourth accused as one of the persons present at the first accused's store.

[76] It is pertinent to note that in his evidence (p. 100 of the appeal record) PW14 stated that all of the identification parades were conducted in accordance with the procedure. The reports on the identification parades were tendered in court as exhs. P19 to P21. At the end of each report PW14 stated that he complied with the directions under "IGSO" relating to the height, age, race and appearance of the participants who took part in the identification parades. PW14 was not challenged by the defence on this issue when he was cross-examined. It is trite that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of his testimony (see *Wong Swee Chin v. Public Prosecutor* [1980] 1 LNS 138; [1981] 1 MLJ 212). The learned trial judge accepted the evidence on the identification of the second, third and fourth accused in the identification parades. PW10 testified that the first accused was his friend and known to him long before the incident.

[77] With respect, we are unable to agree with Mr Viknesvaran that the identification parades held were not in accordance with the guidelines laid down in *R v. Turnbull*. On the evidence available the identification parades had been properly conducted and there was no confusion as to the identification of the second, third and fourth accused made by PW10.

[78] The other important issue in this case is the issue of common intention under s. 34 of the Penal Code. All four accused were alleged to have committed the offence "in furtherance of the common intention". We may usefully refer to three authorities on the subject. In *Namasiyiam Doraisamy v. Public Prosecutor & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 at pp. 251 and 252, Syed Agil Barakbah SCJ opined:

> In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b)

participation in the commission of the intended offence in furtherance of that common intention. Where the prosecution case rest on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused. (The Supreme Court (of India) on *Criminal Law* (1950-1960) by J.K. Soonavala p. 188 to 193).

[79] In *Om Prakash v. State* AIR 1956 All 241, it was held that presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation in the criminal act. The court cited as an example a person who is present at the spot as an eye-witness to the offence, was to be contrasted with a person who is present as a confederate of the assailant. The former is not guilty because he is present merely to see the commission of the crime, whereas the latter is guilty because he is present for the purpose of seeing that the crime is committed.

[80] In *Wan Yurillhami Wan Yaacob & Anor v. Public Prosecutor* [2010] 1 CLJ 17 at p. 35; [2001] 1 MLJ 749 at p. 764 this court opined:

It is a well established principle of law in dealing with the criminal liability under s. 34 of the Penal Code that a pre-concert or preplanning may develop on the spot or during the course of the commission of the offence, but the crucial test is that such plan must precede the act constituting the offence. The existence of common intention is a question of fact and in each case it may be proved as a matter of inference from the circumstances of the case (see the cases of *Mahbub Sha v. Emperor* AIR 1945 PC 118 and *Suresh v. State of Uttar Pradesh* AIR 2001 SC 1344 ...

[81] Learned Deputy Public Prosecutor submitted that the prosecution had established a common intention to commit the offence of murder because it has been proved that the first accused was holding a knife, the third accused holding a parang in the presence of the second and the fourth accused near the deceased, who was lying down on the floor with head injuries.

[82] In respect of the first accused, we are satisfied that the circumstantial evidence gave rise to one and only conclusion that it was the first accused who caused the death of the deceased. The evidence had established as a fact that the first accused was with the deceased when he accompanied PW9 to go to Ampang Tasek/Ampang Campuran to take Jayanthi, who had ran away with the deceased, back to PW9's house. PW9 brought both Jayanthi and the deceased back and he left the deceased at the first accused's place.

[83] PW19 saw the deceased at about 3.30pm in the first accused's office. The second time he saw the deceased was at about 9.30pm in the same room. This time the deceased was lying on the floor dead, naked with a severed head. The first accused was inside the room. The first accused subsequently threatened PW19 not to report the matter to the police.

[84] PW10 saw the first accused holding a knife when he went to the first accused's place between 9.30pm and 10pm and saw the third accused holding a parang. He was at the place for about five to ten minutes. He joined the four accused and other persons to drink liquor there. PW10 saw a body lying in the office of the first accused's store.

[85] The knife and parang were recovered by the police in the drain at Jalan Pandan Indah based on the information given by the first accused to PW8.

[86] The prosecution's case rested on circumstantial evidence. In our view there was insufficient circumstantial evidence, at the end of the prosecution's case, that the second to the fourth accused caused the death of the deceased in furtherance of a common intention. There was no evidence to prove that the second, third and fourth accused were present at the scene as confederates of the first accused.

[87] In our view the prosecution had failed to establish a *prima facie* case against the second, third and fourth accused at the end of the prosecution's case based on a maximum evaluation of the evidence and as such their defence should not have been called.

[88] With regard to the first accused's defence we agree with the conclusion of the learned trial judge that his defence was an after-thought. The learned trial judge had given a careful consideration to the defence pertaining to the existence of Devadas but rejected the defence on the ground that it was never raised by the defence during the prosecution's case, nor the issue raised to any of the prosecution's witnesses during cross-examination.

[89] For the reasons given we dismiss the appeal by the first accused (Appeal No: 05-315-11-2011(B) and allow the appeals by the second, third and fourth accused (Appeals No: 05-317-11-2011(B), No: 05-314-11-2011(B) and No: 05-316-11-2011(B)). The conviction and sentence of the first accused is affirmed and the convictions and sentences of the second, third and fourth accused are set aside.